

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Commerce Committee

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BILL: SB 2330

INTRODUCER: Senator Richter

SUBJECT: Corporations

DATE: March 25, 2009

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	<b>Favorable</b>
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

This bill allows “public corporations” to use an alternative voting requirement for the election of directors through the enactment or amendment of bylaws, as opposed to the plurality voting requirement provided for in current law.

If a public corporation opts to adopt an alternative voting requirement in its bylaws, the alternative voting requirement must require a vote greater than a plurality. Moreover, once this alternative voting requirement is adopted by shareholders, it may not be further amended or repealed, by the board of directors.

This bill allows for the resignation of a director to be effective upon the subsequent happening of an event. Additionally, the bill permits resignations that are effective at a later date, or resignations that are conditioned upon the subsequent happening of an event, to be irrevocable.

This bill provides that when the resignation of a director is conditioned on the subsequent happening of an event, the director’s position may be filled before the vacancy occurs, but the director may not take office until the position is vacant.

This bill substantially amends the following sections of the Florida Statutes: 607.0728, 607.0807, and 607.0809.

## II. Present Situation:

### *Election of Directors*

Under most state corporation statutes, election of directors by plurality voting is the default rule.<sup>1</sup> In a plurality voting system, director nominees who receive the most votes “for” election are elected, up to the number of seats being filled. For example, in an election for seven directors, the seven nominees receiving the most votes are elected.<sup>2</sup> Because in most public corporations the number of vacancies on the board of directors frequently equals the number of nominees, a nominee will be elected to the board, even if he or she receives only one vote and even if votes are withheld, which are generally considered votes “against” a nominee.<sup>3</sup> Effectively, this kind of voting structure diminishes the voting power of a shareholder.

In the last several years, an interest in majority voting in elections of directors has grown rapidly among shareholder and corporate governance activists, and many significant public companies have adopted bylaws to facilitate majority voting.<sup>4</sup> “Majority voting” constitutes a majority of votes in a quorum. Under a “majority voting” requirement, nominees have a harder time being elected because they must obtain the favorable vote of at least a majority of the quorum and negative votes or abstentions would count against the nominee.<sup>5</sup>

Additionally, the American Bar Association’s Model Business Corporation Act (Model Act) has been amended to offer an alternative voting requirement.<sup>6</sup> Under s. 10.22 of the Model Act, a corporation may opt to use a voting system under which directors are initially elected by plurality vote, but serve for only a limited amount of time, if he or she receives more votes against, than for, his or her election. However, this rule would not apply to contested elections.<sup>7</sup>

In Florida, unless otherwise provided under the articles of incorporation, directors of a corporation are elected by a plurality of the votes cast by the shareholders entitled to vote at a meeting at which a quorum is present. If a corporation in Florida wants to change its election requirements, it needs to solicit shareholder approval to amend its articles of incorporation and has to follow the same process to later modify those amended articles, because under s. 607.1002, F.S., a board of directors is limited as to the actions it may take without shareholder approval. Additionally, a “public corporation” has to follow any of the Security and Exchange Commission’s requirements when soliciting the corporation’s proxy for a change to the articles of incorporation, which may be a time-consuming process.<sup>8</sup>

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<sup>1</sup> See the Members of the Committee on Corporations, Securities and Financial Services of the Florida Bar Business Law Section’s Memorandum regarding proposed legislation on the Majority Election of Directors and Contingency Resignation of Directors (January 20, 2009), on file with the Commerce Committee.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Id.*, Claudia H. Allen, *Study of Majority Voting in Director Elections*, available at <http://www.ngelaw.com/files/upload/majoritystudy111207.pdf> and Simpson Thatcher, *Majority Voting in Director Elections; A Look Back and A Look Ahead*, available at <http://www.simpsonthatcher.com/content/publications/pub560.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

### *Resignation of Directors*

Under Florida law, a director may resign at any time by delivering written notice to either the board of directors, its chair, or to the corporation and the resignation is effective when the notice is delivered, unless the notice specifies a later effective date.<sup>9</sup> If a resignation is made effective at a later date, the board of directors may fill the future vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date.<sup>10</sup> This prevents a director who has resigned from being “held over” after the effective date of his resignation until his or her position has been filled.

The Model Act is similar to Florida law in that it contains the same effective date language for a resignation, but has no provision concerning the filling of a vacancy caused by a resignation that is effective at a later date.<sup>11</sup>

### *Board Vacancy*

Florida law currently provides that if there is a vacancy on a board of directors, it may be filled by the affirmative vote of a majority of the remaining directors or by the shareholders, unless the articles of incorporation provide otherwise.<sup>12</sup> If a vacancy will occur at a specific later date, regardless of whether it is due to a resignation, it may be filled before the vacancy occurs.<sup>13</sup> However, the new director may not take office until the vacancy occurs.<sup>14</sup> The Model Act provides for the same procedure for filling a vacancy that is to occur at a later date.<sup>15</sup>

## **III. Effect of Proposed Changes:**

**Section 1** amends s. 607.0728(1), F.S., to allow “public corporations” to use an alternative voting requirement for the election of directors through the enactment or amendment of bylaws, as opposed to the plurality voting requirement provided for in current law. The bylaw voting requirement must require a vote greater than a plurality and once adopted by shareholders, it may not be further amended or repealed by the board of directors. This section would allow for directors or shareholders to adopt a “majority voting” rule, which would require a majority of the votes of a quorum to elect a director. Although unlikely, this section would also allow for directors or shareholders to adopt a “supermajority voting” rule, which would require a “supermajority” of votes to elect a director.<sup>16</sup>

**Section 2** amends s. 607.0807, F.S., to allow for the resignation of a director to be effective upon the subsequent happening of an event, as opposed to a specific effective date or upon delivery of

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<sup>9</sup> See s. 607.0807, F.S.

<sup>10</sup> *Id.*

<sup>11</sup> See § 8.07 of the ABA Model Business Corporation Act.

<sup>12</sup> See s. 607.0809, F.S.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See § 8.10 of the ABA Model Business Corporation Act.

<sup>16</sup> Opinion of likelihood of supermajority vote rule being utilized by public corporations by Professor Stuart R. Cohn, Associate Dean for International Studies, University of Florida Levin College of Law, (received by email on March 20, 2009, on file with the Commerce Committee).

a resignation. This section also permits a board to fill a vacancy caused by resignation to be filled before the effective date of the resignation, as long as the successor does not take office until the effective date. Furthermore, this section provides that resignations that are effective at a later date, or conditioned upon a later event, may be irrevocable.

**Section 3** amends s. 607.0809(3), F.S., to provide that when the resignation of a director is conditioned on the subsequent happening of an event, the director's position may be filled before the vacancy occurs, but the director may not take office until the position is vacant. This section references, and is consistent with, s. 607.0807, F.S., proposed in Section 2 of the bill.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Because public corporations have to currently solicit shareholder approval to amend their articles of incorporation to change the mechanics of director elections, which is a time-consuming and costly process, the bill's provisions would save public corporations wanting to change their election processes time and money.

C. Government Sector Impact:

None.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Although majority voting may be a cost-effective election mechanism that also enhances shareholder control of the corporation and encourages greater discourse between shareholders and directors, there may be some weaknesses associated with this type of voting mechanism.

For example, considering the negative publicity recently bestowed upon public companies and their directors, it has become increasingly difficult for companies to recruit directors.<sup>17</sup> On average, it takes a company 1 year to find a suitable director candidate.<sup>18</sup> Majority voting may exacerbate the problem because director nominees may have to campaign harder for an election and the prospects of an expensive campaign may deter some from seeking a nomination.<sup>19</sup>

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*